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ORIGINAL  
ORIGINAL

IRWIN, CAMPBELL & TANNENWALD, P.C.

ATTORNEYS AT LAW  
1730 RHODE ISLAND AVENUE, N.W.  
SUITE 200  
WASHINGTON, D.C. 20036-3101  
(202) 728-0400  
FAX (202) 728-0354  
www.ictpc.com

TARA S. BECHT  
(202) 728-0401 Ext. 108  
tbecht@ictpc.com

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JUN 14 2000  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

June 14, 2000

Magalie Roman Salas, Secretary  
Federal Communications Commission  
Portals II  
445 12<sup>th</sup> Street, S.W.  
Suite TW-A325  
Washington, D.C. 20554

Re: *Haxtun Telephone Company v. AT&T Corp.* (File No. E-99-28)  
Notice of Ex Parte Contact

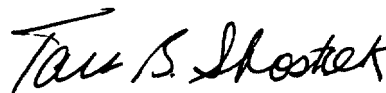
Dear Ms. Salas:

Enclosed herein and filed on behalf of Haxtun Telephone Company ("Haxtun") is a copy of Haxtun's Comments which were filed in response to the Commission's Public Notice requesting comments on RICA and the Minnesota CLEC Consortium's Requests for Emergency Temporary Relief Enjoining AT&T Corp. From Discontinuing Service Pending Final Decision, CC Docket No. 96-262.

Please date stamp the enclosed "File Copy" and return it to the undersigned.

Should you have any questions concerning this matter, please contact the undersigned.

Very truly yours,



Tara B. Shostek

Encl.

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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In the Matter of

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Requests for Emergency Temporary  
Relief Enjoining AT&T Corp. From  
Discontinuing Service Pending  
Final Decision

CC Docket No. 96-262

**COMMENTS OF  
HAXTUN TELEPHONE COMPANY, INC.**

**I. INTRODUCTION**

1. Haxtun Telephone Company ("Haxtun") is a small rural incumbent local exchange carrier ("ILEC") holding certificates of public convenience and necessity issued by the Colorado Public Utilities Commission to provide intrastate local exchange services in Crook, Fleming, and Haxtun, Colorado. Haxtun provides local exchange services to approximately 1,548 access lines and interstate interexchange services to many of these same customers. Haxtun also provides switched access services on a common carrier basis to IXC's, such as AT&T, Sprint, and MCI, which permit the termination of long distance calls between the IXC's' customers and those customers served by Haxtun's exchange. As detailed below, Haxtun supports the Minnesota CLEC Consortium's ("Minnesota Consortium") and the Rural Independent Competitive Alliance's (individually referred to as "RICA" and collectively "Petitioners") Requests for Emergency Temporary Relief ("Requests").

2. The Commission must put an end to AT&T's use of self help. As is evident by the instant Requests for Emergency Relief, AT&T's self serving acts are causing harm to Rural ILECs, CLECs, and subscribers across the country. The Commission must promptly address all instances of AT&T's abuse of the Commission's processes as well as its anticompetitive practices. The

Commission must not continue to allow AT&T to pick and choose by which laws it will abide. AT&T's use of self help is harming competitors and subscribers across the nation and it must immediately be stopped.

II. **PETITIONERS HAVE SATISFIED THE STANDARD FOR THE REQUESTED RELIEF**

3. Petitioners have satisfied the standard for the requested emergency relief. The four part test established in *Jobbers*<sup>1</sup> includes the evaluation of the following four factors: (1) whether the petitioner will likely prevail on the merits; (2) whether the petitioner will be irreparably harmed without the relief sought; (3) whether the issuance of the requested relief would harm other interested parties; (4) whether the public interest would be served by the requested relief.<sup>2</sup> Petitioners have clearly met this test.

A. **Petitioners Are Likely to Prevail on the Merits**

4. AT&T's use of self help, its unilateral refusal to pay Petitioners and other similarly situated carriers for services it has used, billed, and collected from its customers, its refusal to interconnect with other carriers, and its demand that Petitioners stop carrying its traffic violates various provisions of the Act as well as established Commission precedent. Specifically, as outlined by Petitioners, AT&T has violated Sections 201(a), 201(b), 203(c), 214(a) and 251 of the Act. 47 U.S.C. §§ 201(b), 203(c), 214(a) and 251.

5. AT&T's refusal to pay Petitioners' and others' tariffed access charges is severely hampering their ability to provide competitive local exchange services and is squelching competition in the local

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<sup>1</sup> *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921 (D.C.Cir. 1958).

<sup>2</sup> *Id.* at 925.

exchange market. It has also limited the ability of many carriers to obtain the financing needed to provide advanced services to customers in rural America.

6. AT&T has defended its unlawful actions by arguing that it never requested services from these carriers and therefore is not obligated to pay for such services. This argument fails because AT&T has used these carriers' services, has billed and collected from its customers for calls originating and terminating with these carriers, and yet it has unilaterally refused to pay for the services it has used. Under the constructive ordering doctrine, established in the *United Artists* pay telephone case,<sup>3</sup> the Commission found that "affirmative consent [is] unnecessary to establish a customer relationship when a carrier interconnected with other carriers in such a manner that it can expect to receive access services, and when it fails to take reasonable steps to prevent the receipt of access services and does in fact receive such services."<sup>4</sup> From the facts presented in the Requests, it appears that AT&T not only failed to take reasonable steps to prevent the receipt of access services, but also received, billed, and collected from its customers for the access services provided to it by these carriers.

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<sup>3</sup> *United Artists Payphone Corporation v. New York Telephone Company and American Telegraph Company*, 8 FCC Rcd 5563 (1993).

<sup>4</sup> *Access Charge Reform Price Cap Performance Review for Local Exchange Carriers, Interexchange Carrier Purchase of Switched Access Services Offered by Competitive Local Exchange Carriers, Petition of US WEST Communications, Inc., For Forbearance from Regulations as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket 96-262, Fifth Report and Order and Further Notice of Rulemaking, FCC 99-206, at ¶ 188, (1999) ("*Access Charge Reform Fifth Report and Order*"), citing *United Artists*, 8 FCC Rcd at 5565-66.

7. In *United Artists*,<sup>5</sup> the Commission determined that United Artists Payphone Corp. (“UA”), the operator of approximately 550 public payphones, was not an AT&T customer<sup>6</sup> and was therefore not liable to pay for fraudulent long distance calls placed over its payphones. Specifically, the Commission found that UA took affirmative steps to ensure that it was not an AT&T customer, such as not presubscribing its payphones to AT&T’s services and going so far as to designate its lines as “PIC-non” or where that designation was unavailable, “PIC-NYC” which rejected all 1+ interLATA calls, except those directed to certain locations in northern New Jersey. In addition, UA ordered from New York Telephone a service to block 10XXX access code calls from its payphones, and originating line screening and billed number screening services which alert operator service providers of any billing restrictions on lines to which a caller may seek to bill a call.

8. The Commission found that although the fraudulent calls were placed from UA’s payphones, UA had not requested AT&T’s services and had taken reasonable steps to ensure that such a request was not constructively made. Notably, the Commission stated, in support of AT&T’s argument in that case, that a customer can constructively order service:

[i]f UA had failed to take steps to control unauthorized operator-assisted and direct-dialed calling and had, instead, installed its phones in such a way as to allow callers to charge such calls to UA payphone lines, UA could reasonably be held to have constructively “ordered” service from AT&T, thus establishing an inadvertent carrier-customer relationship.<sup>7</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> It is interesting to note that AT&T is the progenitor of the constructive ordering doctrine.

<sup>7</sup> *United Artists* at ¶ 13. See also, *Atlantic Telco, Inc. and Tel & Tel Payphones, Inc.*, Request for Declaratory Ruling, Order, 8 FCC Rcd 8119 (C.C.B. 1993) (a party challenging unauthorized long distance charges will not be considered a “customer” under AT&T’s tariff if it took reasonable steps to block the calls in question and if it did not presubscribe to AT&T); *American Telephone and*

9. In addition, the Commission recently affirmed a ruling by the Common Carrier Bureau (“Bureau”) in *MGC Communications*<sup>8</sup> that even where a carrier states it does not wish to obtain access services from a carrier, but continues to accept such services, it is required to pay the tariffed rate for the services it utilized. The Bureau ruled that while AT&T stated in correspondence that it did not wish to receive originating access services from a CLEC, MGC Communications, Inc. (“MGC”), AT&T’s actions spoke otherwise. The Bureau also found that AT&T failed to take the steps reasonable and necessary to terminate its access service arrangement with MGC and AT&T’s lack of action was “attributable to its desire to avoid service interruption or other inconveniences for its own customers.”<sup>9</sup> Specifically, the Bureau stated that “AT&T did not consider blocking MGC’s traffic because it was unwilling to risk losing existing business customers.”<sup>10</sup> According to the Bureau,

AT&T’s apparently calculated ambiguity was to place MGC in an intractable dilemma: it was forced to choose between sending traffic to AT&T, knowing it would not be paid, and blocking MGC subscribers’ traffic from AT&T’s network,

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*Telegraph Co. v. The City of New York and the New York City Corrections Department*, 83 F.3d 549 (2d Cir 1996) (New York City could not have been held to have constructively ordered services from AT&T unless it failed to take reasonable steps to secure its phones from long distance calling); *MCI Telecommunications Corporation v. Ameri-Tel, Inc.*, 852 F. Supp. 659 (N.D.Ill 1994) (court found no evidence that customer had declined to presubscribe its phones or take other steps to prevent unauthorized calls and therefore, customer constructively ordered services from MCI and was therefore liable for the fraudulent or unauthorized charges); *See also Capital Network System, Inc. v. Federal Communications Commission, et al.*, 28 F.3d 201 (D.C.Cir, 1994); *AT&T Corp. v. Community Health Group; Centro De Salud De La Comunidad De SanYsidro, Inc. d/b/a San Ysidro Health Center*, 931 F. Supp. 719 (S.D.Cal. 1995).

<sup>8</sup> *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (Comm. Car. Bur.), *aff’d*, FCC 99-408 (rel. Dec. 28, 1999).

<sup>9</sup> *Id.* at ¶ 18.

<sup>10</sup> *Id.*

thereby running the legal risks [of terminating or changing its customers' primary interexchange carrier without the customers' express authorization.]"<sup>11</sup>

The Bureau found that AT&T's willingness to accept MGC's access service without paying for that service "amounts to impermissible self-help and a violation of Section 201(b) of the Act. [The Bureau] accordingly grant[ed] MGC's complaint . . . and [held] that AT&T is liable to MGC, at MGC's tariffed rate, for the originating access service that it received . . . plus interest."<sup>12</sup>

10. AT&T's treatment of the Petitioners is substantially similar to its treatment of MGC. AT&T constructively ordered service from the Petitioners when it used and charged its customers for their services. AT&T sent traffic to the Petitioners that it unambiguously knew was destined for Petitioners' customers and it took no reasonable steps to prevent the calls from continuing. Such lawful steps may have included filing a complaint against Petitioners alleging unreasonable practices, requesting a cease and desist order from a court or the FCC, challenging the Petitioners' tariffs, or filing an application for authority to discontinue service to Petitioners' customers. AT&T took none of these steps. On the contrary, AT&T continued to market its services to Petitioners' customers.

11. AT&T has established a practice of knowingly utilizing ILEC and CLEC access services, billing and collecting from its customers for calls routed to these carriers, but refusing to pay those carriers for the access services it used. This cannot be allowed to continue.

12. AT&T has demanded that Petitioners, and others, immediately discontinue carrying its customers' traffic. However, as established in the Requests, AT&T's unilateral withdrawal of its

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<sup>11</sup> *Id.* at ¶ 20.

<sup>12</sup> *Id.* at ¶ 26.

services from Petitioners' subscribers without first obtaining FCC authority to do so, violates several provisions of the Communications Act. Prior to discontinuing, reducing or impairing service to a community, AT&T must obtain a certificate from the FCC stating that "neither present nor future public convenience and necessity will be adversely affected thereby." 47 U.S.C. § 214. AT&T has breached this statutory duty by wrongfully discontinuing service to its customers without first obtaining the required certificate. In addition, as a telecommunications common carrier, AT&T has an undeniable duty to provide services upon reasonable request and it may not discontinue or refuse to establish interconnections with other telecommunications carriers, including Petitioners. *See*, 47 U.S.C. § 201(a) and 251(a)(1).

13. AT&T's use of self help is unlawful. While AT&T has the right to seek FCC relief if it has grievances against Petitioners, it cannot exercise vigilante "self-help" by withholding money due for services utilized or unilaterally discontinuing service.<sup>13</sup> The FCC has repeatedly condemned customers, including carriers, who take services from other carriers and then refuse to pay rather than file complaints.<sup>14</sup> AT&T delivered traffic to and accepted traffic from Petitioners. It used, billed,

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<sup>13</sup> AT&T is not without recourse because it is unable to exercise self-help. Sections 206-209 of the Act set forth the complaint procedure to be used by carriers who believe a carrier is violating the Act. 47 U.S.C. §§ 206-209.

<sup>14</sup> *See MCI Telecommunications Corp.*, 62 FCC 2d at 705-706 (customer may not withhold payment of properly billed tariffed charges); *Applications of Bell Tel. Co. of Pennsylvania*, 66 FCC 2d 227 (a carrier "cannot justify non-payment of charges properly billed . . . [s]uch self-help remedies are contrary to Section 203 of the Communications Act of 1934, as amended, and existing case law"); *Business WATS, Inc. v. AT&T*, 7 FCC Rcd 7942 ("a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier's applicable tariffed charges and regulations"); *Affinity Network, Inc. v. AT&T*, 7 FCC Rcd 7885 (customer may not exercise self-help, but must pay tariffed charges and seek redress if charges were unlawful); *NOS Communications, Inc. v. AT&T*, 7 FCC Rcd 7889 (Enf.Div.,



and collected from its customers for this traffic, but it refused, and continues to refuse, to pay for Petitioners' access services. AT&T cannot exercise self help and refuse to pay for services it has used, nor can it unilaterally decide to discontinue service. The Commission must not condone AT&T's behavior. It must grant the requested relief.

14. As outlined above, AT&T's refusal to interconnect with Petitioners as well as other similarly situated carriers, and its attempts to discontinue service to its customers without FCC authorization is unlawful. For these reasons, Petitioners are likely to prevail on the merits of their Petitions.

**B. Petitioners and the Public Will Be Irreparably Harmed Without the Requested Relief, But Such Relief Would Not Harm Other Interested Parties**

15. Petitioners as well as the public at large will be irreparably harmed without the requested relief. If AT&T is permitted to discontinue service to the targeted customers, and it is not required to maintain or establish interconnections with Petitioners' facilities, customers across the country that are presubscribed to AT&T's interexchange services will be unable to call Petitioners' local customers. In addition, if AT&T is not stopped, Petitioners' customers will not be able to take advantage of both AT&T's and Petitioners' competitive services and prices. AT&T's refusal to serve has severely hampered Petitioners' ability to attract new customers. AT&T is stifling competition in the local exchange market<sup>15</sup> and without Commission intervention competition in the provision of local services will be brought to a standstill nationwide. The public interest will be

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Com.Car.Bur., 1992); *Business Choice Network v. AT&T*, 7 FCC Rcd 772 (Enf.Div., Com.Car.Bur., 1992) (carrier may not entitle itself to the self-help measure of withholding payment for tariffed services).

<sup>15</sup> It is interesting to note that as AT&T moves into the local exchange market, the number of instances that AT&T has refused to pay other carriers' access charges and it has demanded that local carriers discontinue carrying its traffic has increased.

served by grant of the requested relief because it will ensure that carriers are able to continue to provide competitive local exchange services.

16. On the other hand, AT&T will not be substantially harmed by grant of the requested relief. In fact, until such time as the Commission finds that AT&T's nationwide refusal to pay carriers' tariffed access charges, AT&T will continue to use these carriers' access services, bill and collect from its customers for calls terminated and originated by the carriers -- for free. By granting the requested relief, AT&T stands to obtain a substantial, albeit temporary, monetary windfall.

**C. The Public Interest Will Be Served by Granting the Requested Relief**


17. As outlined above, the public interest will be harmed if AT&T is permitted to discontinue service to the Petitioners' customers without first obtaining FCC authority to do so. The public must be informed of AT&T's intention to discontinue service and it must be afforded the opportunity to comment on the proposal. Furthermore, AT&T cannot unilaterally decide with whom it will interconnect. When it amended the Act in 1996, Congress found that the public interest would be served by greater competition in the local exchange marketplace. This can only be accomplished if all telecommunications carriers are required to interconnect with all other telecommunications carriers. AT&T is not an exception to this general rule. AT&T must not be permitted to harm the public by stifling competition in the local marketplace by refusing to do business with potential competitors.

**III. Conclusion**

18. Petitioners have satisfied the standard for emergency relief. The public interest will only be served if the Commission acts promptly on the Petitioners' Requests and directs AT&T to continue providing its services to the Petitioners' customers. The Commission should also rule on the

lawfulness of AT&T's use of self help and its refusal to pay carriers' tariffed access charges. The FCC cannot continue to condone, through inaction, AT&T's use of self help to circumvent carriers' lawfully filed tariffs, and its refusal to abide by the Act and the FCC's rules and regulations.

Respectfully Submitted,  
Haxtun Telephone Company

A handwritten signature in black ink, reading "Tara B. Shostek", is written over a horizontal line.

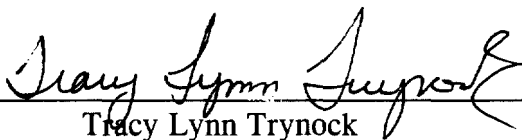
David A. Irwin  
Tara B. Shostek  
Irwin, Campbell & Tannenwald, P.C.  
1730 Rhode Island Avenue, N.W.  
Suite 200  
Washington, D.C. 20036-3101  
Tel. 202-728-0400  
Fax: 202-728-0354

It's Counsel

June 14, 2000

## CERTIFICATE OF SERVICE

I, Tracy Lynn Trynock, hereby certify that on this 14th day of June, 2000, copies of the foregoing "Comments of Haxtun Telephone Company, Inc." have been served by first-class United States mail, postage pre-paid or by hand delivery upon the following:

  
Tracy Lynn Trynock

Ms. Wanda Harris\*  
Competitive Pricing Division  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, S.W.  
Room 5-A452  
Washington, D.C. 20554

International Transcription Services\*  
1231 20<sup>th</sup> Street, N.W.  
Washington, D.C. 20036

David Cosson, Esq.\*  
Sylvia Lesse, Esq.  
Kraskin, Lesse & Cosson, L.L.P.  
2120 L Street, N.W.  
Suite 520  
Washington, D.C. 20037  
The Rural Independent Competitive  
Alliance

Michael J. Bradley, Esq.  
Richard J. Johnson, Esq.  
Moss & Barnett  
A Profession Association  
4800 Norwest Center  
90 South Seventh Street  
Minneapolis, MN 55402-4129  
The Minnesota CLEC Consortium

Peter H. Jacoby, Esq.  
295 North Maple Ave.  
Room 3250J1  
Basking Ridge, NJ 07920  
AT&T Corp.

D. Cameron Findlay, Esq.  
Daniel Meron, Esq.  
Sidley & Austin  
Bank One Plaza  
10 S. Dearborn Street  
Chicago, IL 60603